UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA v. EARL FRANCIS HART, Defendant	Crim. No. 09-10005-PBS

GOVERNMENT'S SENTENCING MEMORANDUM AND OPPOSITION TO STANDBY COUNSEL'S MOTION FOR AN EVIDENTIARY HEARING

The United States of America, by undersigned counsel, submits this Sentencing Memorandum in advance of the January 27, 2011 sentencing of Defendant Earl Francis Hart (hereinafter, "defendant"). The United States also responds herein to paragraph four of the motion by standby counsel James B. Krasnoo (hereinafter, "standby counsel") for an evidentiary hearing.[1]

Because the United States filed an Information pursuant to 18 U.S.C. § 3559(c), the Court is statutorily required to sentence defendant to a mandatory term of life imprisonment on Count Four,

[1] The Court already denied the other paragraphs of the Motion for an Evidentiary Hearing. See ECF Dkt. No. 223. The government takes no position on the motion to withdraw as standby counsel [ECF Dkt. No. 222], which was filed one day after the Court denied standby counsel's motion to continue defendant's sentencing, but one week prior to the Motion for an Evidentiary Hearing. In addition, with respect to the unnecessary "Motion for Discovery re 18 U.S.C. § 3559(c)" [ECF Dkt. No. 218], the government notes that it has already twice-provided the discovery requested in that motion: (1) the certified convictions were attached to the government's original 18 U.S.C. § 3559(c) notice in December 2009 and are currently available on ECF, as they have been since December 2009 [ECF Dkt. No. 70]; and (2) the government sent the convictions again by letter to defendant and standby counsel on August 20, 2010 [ECF Dkt. No. 150].

the 18 U.S.C. § 924(c) count. For the reasons set forth below, however, even if the law did not require a mandatory life sentence, the nature and circumstances of this offense, along with defendant's thirty-year violent criminal history and the need to protect the public from his future violence, a sentence of life imprisonment is appropriate pursuant to the factors set forth in 18 U.S.C. § 3553.

I. THE FEDERAL THREE STRIKES LAW - 18 U.S.C. § 3559(c)

On December 2, 2009, the United States filed an Information pursuant to 18 U.S.C. § 3559(c) stating its intention to seek mandatory life if defendant was convicted of brandishing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c). Pursuant to 18 U.S.C. § 3559(c), a defendant convicted of a serious violent felony, who has two prior serious violent felonies (as they are defined specifically in the statute), shall be sentenced to mandatory life imprisonment.

In October 2010, a federal jury convicted defendant on the 18 U.S.C. § 924(c) count. Brandishing a firearm in furtherance of a drug trafficking crime is a serious violent felony pursuant to 18 U.S.C. § 3559(c). See 18 U.S.C. § 3559(c)(2)(F)(i). Accordingly, if defendant has two prior qualifying serious violent felonies, the Court must sentence him to mandatory life. See United States v. Farmer, 73 F.3d 836 (8th Cir. 1996) (holding that Three Strikes statute, when applicable, withdraws all discretion from sentencing court whether to impose life term).

When the government filed its 18 U.S.C. § 3559 notice on December 2, 2009, it attached certified copies of three of defendant's prior convictions that constitute serious violent felonies, or "strikes," as defined in 18 U.S.C. § 3559(c).

The three prior qualifying convictions, or "strikes," are:

- Assault and Battery with a Dangerous Weapon (docket number 881439A, Salem, Massachusetts);
- Assault and Battery with a Dangerous Weapon (docket number 8713CR2607A, Lynn, Massachusetts); and
- Assault and Battery with a Dangerous Weapon (docket number 870943A-D, Lynn, Massachusetts).

While it appears that these three convictions are defendant's only 18 U.S.C. § 3559 "strikes," it should be noted that defendant has multiple other violent felony convictions. For example, as noted at page 15 of the Presentence Report (hereinafter, "PSR"), defendant was convicted in 1979 in California for first degree burglary and attempted robbery which inflicted great bodily injury (hereinafter, "1979 California convictions"). According to California court records, attached hereto as Exhibit A, the victim on whom defendant inflicted great bodily injury was over 60 years of age. According to those same records, the conviction stemmed from an incident in which defendant broke into an elderly couple's home at approximately 12:58 a.m., started hitting the female occupant of the home in her face when defendant encountered her in her bedroom, then severely assaulted the male victim when he attempted to help his wife, at one point telling the female, "I think I'll kill your husband, how would you like that?" According to one of the police reports also attached as part of Exhibit A, during the attack, defendant was holding a large glass basket as if he was going to use it as a weapon. For those charges, he received the statutory maximum of nine years' incarceration. While incarcerated on those charges, defendant was arrested seven additional times for possessing a weapon, three additional times for assault, and once for escape. See PSR at p. 15.

In addition to the 18 U.S.C. § 3559 "strikes" and the 1979 California convictions, defendant was also sentenced to five to seven years' incarceration for assault with a dangerous weapon in Lynn, Massachusetts in 1988 stemming from an incident in which he led police on a high-speed chase, disobeyed their attempts to arrest him at gunpoint, ran his vehicle into police cruisers, causing one of those cruisers to swerve onto the sidewalk, collide with a second victim, and cause the occupant of that second vehicle, who was in critical condition, to require emergency surgery. See PSR 19-20. Of course, in addition to these charges, there are a litany of other felony convictions in the PSR, including assault and battery on a correctional officer, multiple assaults by dangerous weapon, and assault and battery on a police officer. See generally PSR at pages 25-30. Finally, attached to this pleading as Exhibit B are reports from Plymouth County

Correctional Facility ("PCCF") detailing ten separate assaults defendant has committed or participated in during his incarceration at PCCF in this matter since approximately September 2008.

A. "Serious Violent Felony" Defined

18 U.S.C. § 3559(c)(2)(F)(ii) provides, "the term serious violent felony means any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense."

Each of defendant's three prior qualifying convictions were violations of Massachusetts General Law ("M.G.L.") 265 § 15A, Assault and Battery with a Dangerous Weapon. The statute provides, in pertinent part, "[w]hoever commits assault and battery upon another by means of a dangerous weapon shall be punished by imprisonment in the state prison for not more than ten years ..." (emphasis added). See M.G.L. 265 § 15A(b). The maximum penalties for M.G.L. 265 § 15A(b) have not changed since at least 1927. See 1927 Mass. Acts, p. 194, Chap. 187, "An Act to Provide a Penalty For Assault and Battery With a Dangerous Weapon" (amending M.G.L.A. 265 § 15 to M.G.L.A. 265 § 15A and providing for a maximum term of imprisonment of ten years).

M.G.L. 265 § 15A requires the Commonwealth to prove that defendant actually used force against his victim. See Commonwealth v. Appleby, 380 Mass. 296, 308 (1980) ("[I]n sum, the offense of assault and battery by means of a dangerous weapon under G.L. c. 265, s 15A, requires that the elements of assault be present ... that there be a touching, however slight ... that that touching be by means of the weapon ... and that the battery be accomplished by use of an inherently dangerous weapon, or by use of some other object as a weapon, with the intent to use that object in a dangerous or potentially dangerous fashion."). Additionally, the Massachusetts legislature has provided for a maximum term of imprisonment of "not more than ten years," on convictions pursuant to M.G.L. 265 § 15A.; accordingly, such convictions qualify as serious violent felonies. See United States v. Rasco, 123 F.3d 222 (5th Cir. 1997) (holding that a state offense punishable by term of "not more than 10 years" qualified as an offense punishable by "maximum term of imprisonment of 10 years or more," and thus as a "serious violent felony" under the federal three strikes statute); see also United States v. Jones, 319 F.Supp.2d 703 (N.D. W.Va. 2004) (finding that a Maryland misdemeanor assault conviction qualified as a strike even though it was only a misdemeanor under Maryland law since elements of Maryland crime satisfied requirements for "serious violent felony").[2]

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[2] Defendant relies heavily on the Supreme Court's recent decision in Johnson v. United States, 130 S.Ct. 1265 (2010) to claim that his prior convictions should not count as "strikes."

B. Burden on Defendant to Establish by Clear and Convincing Evidence that Prior Convictions are not "Strikes"

Once the government files an Information pursuant to 18 U.S.C. § 3559(c), the prior convictions are presumed valid and the burden shifts to the defendant to establish by clear and convincing evidence that the prior convictions are invalid and should not be counted as strikes. See 18 U.S.C. § 3559(c)(1)-(3); see also United States v. Bradshaw, 281 F.3d 278, 295 (1st Cir. 2002)("Three Strikes Law initially presumes that prior convictions falling under one of the statutorily enumerated definitions are valid, 18 U.S.C. § 3559(c)(1)-(2), and then provides the defendant with the opportunity to disqualify the convictions, id. § 3559(c)(3)").

The First Circuit (and every other Circuit that has considered the issue) has unequivocally held that the burden-shifting scheme in 18 U.S.C. § 3559 is constitutional: " ... a paradigm that

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Johnson, however, is no lifeline for defendant here. First, Johnson was about the specific question of what constituted "physical force" as that term is used in the Armed Career Criminal Act to determine what counts as a "violent felony" under that Act. Id. at 1269-70. 18 U.S.C. § 3559 is an entirely separate and distinct statute that provides its own very specific definition of what counts as a "strike," or serious violent felony. Second, the predicate crime at issue in Johnson was a simple battery, that, under the relevant Florida law, did not contain as an element the use of physical force against another person. Id. at 1273-74. Here, the predicate crimes, all assault and batteries with a dangerous weapon, do in fact provide for the use of force against another person, as discussed above in Appleby. Moreover, as noted by Probation at page 66 of the PSR, in each of defendant's "strike" convictions, the criminal complaints allege that defendant did "assault and beat" the victim, rendering Johnson even less relevant.

allows the defendant to raise an affirmative defense during the sentencing phase of criminal proceedings, but then shifts the burden of proof to him to establish the defense, does not violate due process." Bradshaw, 281 F.3d at 295; see also United States v. Gatewood, 230 F.3d 186, 189-90 (6th Cir. 2000)(en banc)(same); United States v. Ferguson, 211 F.3d 878, 887 (5th Cir. 2000)(same); United States v. Smith, 208 F.3d 1187, 1190 (10th Cir. 2000)(same); United States v. Kaluna, 192 F.3d 1188, 1196 (9th Cir. 1999)(en banc)(same).[3]

Accordingly, unless defendant presents clear and convincing evidence to this Court on January 27, 2011 that two of the three "strikes" attached to the government's December 2, 2009 Information are invalid, the Court must sentence defendant to a mandatory term of life imprisonment on Count Four. The government submits that defendant will not be able to make such a showing precisely because the convictions are valid. In fact, even though the government bears no burden with respect to proving the validity of the convictions, the Court can infer from the substantial effort that defendant has made to vacate his prior convictions, both through prior appointed counsel Matthew A. Kamholtz and standby counsel, that defendant knows the convictions are valid. A packet containing a series of motions filed by Attorney Matthew A. Kamholtz attempting to vacate or set aside prior convictions of defendant was too large to be attached to this filing. The government will bring a copy to court on January 27, 2011.

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[3] As defendant himself concedes at pages 21-24 of his Objections to the PSR, all of his other constitutional arguments, e.g., that 18 U.S.C. § 3559 violates separation of powers, amounts to an ex post facto clause violation, and violates double jeopardy, have been explicitly rejected by the federal appellate courts that have considered them.

Indeed, even though defendant concedes his efforts to vacate his "strikes" have been entirely unsuccessful, it certainly has not been for lack of trying. Attorney Kamholtz filed over 120 pages of paperwork attempting to vacate the very convictions in the government's 18 U.S.C. § 3559 notice.[4] Additionally, standby counsel has filed his own motion for a new trial for defendant in Essex Superior Court. In fact, in support of that motion, standby counsel even swore out an affidavit, in September 2010, purporting to have a recollection that on some unspecified date, during an approximately seventeen-year period (1973 to 1990), standby counsel recalled being in the courtroom of Superior Court Justice Ronan and

[4] In light of defendant's substantial effort to vacate these convictions, which commenced no later than early-March 2010, only a few months after the government filed the 18 U.S.C. § 3559 Information, it is odd that defendant and standby counsel continue to profess ignorance as to the predicate offenses on which the government intends to rely. See Defendant's Motion for Evidentiary Hearing [ECF Dkt. No. 223], at ¶4 ("the defendant has already requested the government disclose to the defendant those charges the government intends to rely upon to prove defendant's eligibility under 18 U.S.C. § 3559(c) ...);" see also Motion for Discovery re: 18 U.S.C. § 3559(c) [ECF Dkt. No. 218], at ¶5 ("the defendant has no way to know which charges the government intends to use to prove he is subject to life imprisonment under 18 U.S.C. § 3559(c)."

hearing the judge conduct five or six colloquies, most or all of which, according to standby counsel's memory over twenty years after the fact, were deficient for failing to advise defendants of their rights and/or failing to inquire whether defendants were threatened or promised anything to coerce their pleas.[5] See Exhibit C, Commonwealth's Supplemental Opposition to Defendant's Motion for New Trial, November 5, 2010 at page 13, citing Affidavit of James B. Krasnoo, at ¶¶ 3,5. Clearly recognizing the self-serving nature of the most recent motion for a new trial, Superior Court Justice Kern just rejected it, specifically finding that defendant's plea was knowing and voluntary and also noting that the affidavits filed by standby counsel and the other attorneys "contain[ed] mostly generalities and were not on point." See Exhibit D, January 4, 2011 Opinion of Massachusetts Superior Court Justice Leila A. Kern, at 4-5.

[5] Justice Ronan presided over one of defendant's prior pleas. To be clear, in his affidavit standby counsel did not purport to be at Justice Ronan's plea colloquy with defendant, he just claimed to be present at some other allegedly insufficient colloquies over twenty years ago before Judge Ronan.

II. SENTENCING GUIDELINES

As the government stated in its opposition to defendant's motion to continue the sentencing, see ECF Dkt. No. 220 at ¶ 3, because defendant must be sentenced to a mandatory term of life imprisonment on Count Four, his sentence is not controlled by the Guidelines. Nevertheless, the government has no objections to the comprehensive and thorough PSR that Probation was able to prepare in this case, despite defendant's refusal to be interviewed for the report.

The only additional point that the government makes with respect to the Sentencing Guidelines is that, in light of the pending prosecution of defendant in United States v. Hart, 10-10172-NMG, for the violent assault of his arm- and leg-shackled co-defendant Hector O'Brien in the cellblock outside this courtroom, and for the reason set forth at page 57 of the PSR, i.e., that the enhancement has no impact on defendant's ultimate sentence, the government does not intend to press for an enhancement in this case for obstruction of justice pursuant to USSG § 3C1.1, even if Probation is technically correct that it applies.

III. 18 U.S.C. § 3553

As stated previously, defendant's sentence of mandatory life is non-discretionary. Even if the Court had discretion, however, consideration of the 18 U.S.C. § 3553 factors compels a life sentence for defendant.

A. 18 U.S.C. § 3553(a)(1) - Nature and Circumstances of Offense and Defendant's History

As the Court is no doubt aware having presided over trial of this matter, defendant is a very dangerous man. In this case, among other things, he held a racked and loaded gun (meaning that all defendant needed to do to fire the gun was to press the trigger) to the head of undercover Peabody Police then-Sergeant Scott Richards, told Sergeant Richards, "give me the pills you piece of shit or I'm going to fucking kill you," and proceeded to rob Sergeant Richards of what defendant thought were 125 oxycodone pills. As the Court is also no doubt aware, Lieutenant Richards testified at trial that when defendant held the gun to his head, his hand was steady, he had a cold stare in his eyes, and there was no doubt in Lieutenant Richards's mind that defendant would have killed him if he did not get himself out of that situation. As an aside, the government notes that Lieutenant Richards will provide the Court with a victim impact statement on January 27, 2011, detailing the toll that defendant's actions have taken on his life.

As the Court is also no doubt aware, defendant's egregious conduct in this case is in keeping with a lifelong pattern of contempt for the rule of law and repeated acts of violence against members of law enforcement and society's most vulnerable citizens. Indeed, defendant to this day continues to assault and beat other inmates. See generally Exhibit B. Juxtaposed against this pattern of violence and disregard for the law are virtually no mitigating factors. In this vein, the Court should reject defendant's self-serving attempt to portray himself as a single parent and loving father. Not only is such a claim undermined by defendant's life history, it also cannot stand up to defendant's own comments to the jury at closing argument that in September 2008, his nine-year-old daughter was living with him in Room 74 at the Carriage House Motel in Peabody, Massachusetts (although according to defendant she was not there on the day he was arrested). As the Court learned and observed through testimony and exhibits at trial, in September 2008, Room 74 of the Carriage House Motel was a cesspool, containing, among other things totally unfit for young children, a gun holster, heroin, drug paraphernalia, and a dead mouse. The Motel itself was long-regarded by law enforcement as a hub of criminal activity, according to defendant's own witness at trial a brutal rape occurred there shortly before he was arrested, and the Motel has since been shut down by authorities.

Finally, the Court should reject standby counsel's mystifying claims that, "[n]o rational or humane basis exists for the imprisonment for life of a defendant who attempted the purchase of only 125 OxyContin pills in a reverse sting operation," and that such a sentence would amount to cruel and unusual punishment. See Defendant's Objections to PSR at p. 24. This was not a small oxycodone case. This was a case in which the jury unanimously found that defendant held a loaded gun to the head of an undercover police officer and robbed him. In any event, there is assuredly nothing cruel and unusual about the application of 18 U.S.C. § 3559(c) to this defendant.

B. 18 U.S.C. § 3553(a)(2)(A), (B), and (C) - Need to Promote Respect For Rule of Law, Afford Adequate Deterrence, and Protect Public From Defendant's Future Violence

The only way to protect the public from Earl Francis Hart is to ensure that Earl Francis Hart is never again a member of the general public. Accordingly, the government respectfully suggests that a life sentence is the minimum sentence sufficient to accomplish that objective. Further, as defendant has been breaking the law his entire life (primarily by attacking and victimizing others), the best way — in fact, the only way — to now promote respect for the rule of law is to sentence defendant to life imprisonment. Finally, in accordance with 18 U.S.C. § 3553(a)(2)(B), this Court should send a strong message to both defendant and the general public that gun violence by career criminals, especially against police officers, is totally unacceptable in a free society and will be met with the most severe consequence the law allows.

IV. SECURITY ISSUES

As the Court is well-aware from trial of this matter, defendant presents numerous security risks. While still significant, some of those risks at trial were offset at least in part by defendant's incentive to comport himself appropriately in front of the jury. Because of defendant’s violent history, lack of any incentive to behave now, and sentencing consequence of life imprisonment, the government respectfully requests that he be in both leg shackles and handcuffs on January 27, 2011 during sentencing.

Respectfully submitted,

CARMEN M. ORTIZ
United States Attorney

By: /s/ Zachary R. Hafer
Zachary R. Hafer
George W. Vien
Assistant U.S. Attorneys

Date: January 20, 2011

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and a paper copy will be mailed to defendant Earl Francis Hart via first-class mail at Plymouth County Correctional Facility.

/s/ Zachary R. Hafer
Zachary R. Hafer
Assistant U.S. Attorney